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NAGADEVAN MAHALINGAM

v.

MILLENNIUM MEDICARE SERVICES

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COURT OF APPEAL, PUTRAJAYA
SULAIMAN DAUD JCA
AZHAR MA'AH JCA
MOHAMED APANDI ALI JCA
[CIVIL APPEAL NO: J-03(IM)-95-09]

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15 OCTOBER 2010

CONTRACT: *Restraint of trade - Restrictive covenant clause - Whether covenant in restraint of trade - Whether void and unenforceable under s. 28 Contracts Act 1950 - Whether clause fell within Exception 2 to*

D

s. 28

PROFESSIONS: *Medical practitioners - Restrictive covenant clause - Whether covenant in restraint of trade - Whether void and unenforceable under s. 28 Contracts Act 1950 - Whether clause fell within Exception 2 to s. 28*

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The appellant was a registered medical practitioner and was admitted as a working partner of the respondent firm pursuant to a partnership agreement entered between the appellant and the old partners of the respondent firm (the 'agreement'). He left the

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respondent within three (3) years to practice at another clinic that was within a fifteen (15) km radius of the respondent. The respondent brought an action against the appellant on the ground that the appellant infringed cl. 11(iii) of the agreement that restricted the appellant from setting up any medical practice, after

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ceasing to be a partner, within a 15 km radius of the respondent and within three years, without the written consent of respondent. The respondent successfully obtained an interlocutory injunction against the appellant. The appellant applied to strike out the respondent's action but the application was dismissed by the

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Senior Assistant Registrar. The appellant now appealed.

The issues were: (1) whether cl. 11(iii) of the agreement was a restraint of trade clause and thereby void and unenforceable under s. 28 of the Contracts Act 1950 ('s. 28'); and (2) if so, whether

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it fell within Exception 2 to s. 28.

Held (allowing the appeal with RM10,000 costs):
Per Sulaiman Daud JCA delivering the judgment of the court:

(1) Clause 11(iii) had the effect of restricting the liberty of the appellant to carry on the practice of medical practitioner in future, either by himself or with other persons for such period and within such limit as specified therein. Therefore, it was a restraint of trade clause within s. 28. (para 12)

(2) Exception 2 only applied to an agreement made between partners and that the agreement was made upon or in anticipation of the dissolution of the partnership. In the present case, the appellant was not a partner of the respondent firm at the time the agreement was initially made. He was only admitted as a partner pursuant to the agreement. Since the appellant was not a partner at the material time, then it could not be said that the agreement was made in anticipation of the dissolution of the partnership. Further, it was not pleaded in the statement of claim that the restrictive covenant sought to be enforced was made with such an objective. The respondent's case was clearly untenable and could not possibly succeed. It followed that cl. 11(iii) of the agreement was a covenant in restraint of trade and therefore void under s. 28. (paras 13 & 14)

Bahasa Malaysia *Translation Of Headnotes*

Perayu adalah seorang pengamal perubatan berdaftar dan telah diterima sebagai sekutu kerja di firma responden berdasarkan kepada satu perjanjian perkongsian yang dimeterai di antara perayu dan rakan kongsi-rakan kongsi terdahulu firma responden ('perjanjian'). Perayu telah meninggalkan firma responden dalam tempoh tiga (3) tahun untuk beramal di sebuah klinik lain yang terletak dalam lengkongan lima belas (15) kilometer dari firma responden. Responden telah memfail tindakan terhadap perayu atas alasan bahawa perayu telah melanggar fasal 11(iii) perjanjian, yang menghalang perayu dari memulakan amalan perubatan, selepas meninggalkan perkongsian dalam tempoh tiga tahun, dalam lengkongan 15 kilometer dari responden, tanpa persetujuan bertulis diberikan oleh responden. Responden telah berjaya mendapatkan

injunksi interlokutori terhadap perayu. Perayu memohon untuk membatalkan tindakan responden, namun permohonannya ditolak oleh Penolong Kanan Pendaftar. Perayu telah merayu.

Isu-isu yang berbangkit adalah: (1) sama ada fasal 11(iii) perjanjian merupakan fasal halangan perniagaan dan kerana itu tak sah dan tidak boleh dikuatkuasakan di bawah s. 28 Akta Kontrak 1950 ('s. 28'); dan (2) jika begitu, sama ada ianya dirangkumi oleh Pengecualian 2 s. 28 tersebut.

Diputuskan (membenarkan rayuan dengan kos sebanyak RM10,000):
Oleh Sulaiman Daud HMR menyampaikan penghakiman mahkamah:

(1) Fasal 11(iii) mempunyai kesan menghalang kebebasan perayu untuk menjalankan amalan pengamal perubatan pada masa akan datang, sama ada secara bersendirian atau bersama orang lain untuk tempoh dan dalam had lengkongan seperti yang ditetapkan di situ. Oleh itu, ia adalah satu fasal halangan perniagaan di bawah s. 28.

(2) Pengecualian 2 hanya terpakai kepada perjanjian yang dibuat ekoran pembubaran atau jangkaan pembubaran perkongsian. Dalam kes semasa, perayu bukan seorang rakan kongsi firma responden semasa perjanjian dimeterai pada mulanya. Beliau hanya diterima sebagai rakan kongsi ekoran dari perjanjian. Oleh kerana perayu bukan seorang rakan kongsi pada waktu material, maka ianya tidak boleh dikatakan bahawa perjanjian dibuat atas jangkaan perkongsian dibubarkan. Selain itu, ianya tidak diplidkan dalam penyata tuntutan bahawa kovenan menghalang yang hendak dikuatkuasakan itu dibuat dengan matlamat sedemikian. Kes responden jelas tidak dapat dipertahankan dan tidak mungkin berjaya. Ianya mengikut bahawa fasal 11(iii) perjanjian adalah kovenan halangan perniagaan dan kerana itu terbatal di bawah s. 28.

Case(s) referred to:
Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***
General Steel Industries Inc v. Commissioner of Railways (NSW) [1964] 112 CLR ***(refd)***
Petrofina (Gt. Britain) Ltd v. Martin And Another [1966] 1 All ER 126 ***(refd)***

Polygram Records Sdn Bhd v. The Search & 5 Ors [1994] 3 AMR 40 ***(refd)***
United Manufacturers Sdn Bhd v. Pogon Tokou Sdn Bhd & Anor [1985] 1 LNS 163 HC ***(refd)***
Wrigglesworth v. Wilson Anthony [1964] 1 LNS 222 HC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 28
Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (c)

For the appellant - Mohd Faizal Ahmad; M/s Hazelin & Assocs
For the respondent - KS Pang; M/s KS Pang & Co

[Appeal from High Court, Johor Bharu; Civil Suit No: 22-584-2007(1)]

Reported by Usha Thiagarajah

JUDGMENT

Sulaiman Daud JCA:

[1] This is an appeal by the appellant against the decision of learned judge of the High Court dismissing his appeal from the order of the Deputy Registrar in refusing to strike out the respondent's writ of summons and statement of claim under O. 18 r. 19(1)(a), (b) and (c) of the Rules of the High Court 1980 ("RHC"). The appeal relates to the enforceability of a restrictive covenant contained in a partnership agreement entered between medical practitioners. After hearing submissions of counsel from both parties, we allowed the appeal with costs. We now give our reasons for the decision.

[2] The relevant facts are not disputed and are as follows. The appellant (defendant in the court below) is a registered medical practitioner in practice in the State of Johore. The respondent (plaintiff in the court below) is a partnership of medical practitioners engaged in the practice of medicine in that state. By a partnership agreement dated 1 November 2006 entered between the appellant and the old partners of the firm ("the agreement"), the appellant was admitted as a working partner of the firm. Clause 2(i) of the agreement provided that the partnership commenced from the date of the agreement and should continue for a term of two years from that date, after which the partnership

should continue on yearly basis. Clause 2(ii) conferred on the appellant the right to terminate the partnership by giving a three-months notice in advance to the managing partner.

[3] The agreement also contained a restrictive covenant, in cl. 11(iii), in the following terms:

> 11. No partner shall without the written consent of the Managing Partner:
>
> (i) …
>
> (ii) …
>
> (iii) set up any medical practice within three (3) years after ceasing to be a partner within a radius of 15 KM from any partnership clinic as medical practitioner either by himself or as a partner or employee of any person or company.

[4] In February 2007 the appellant decided to resign as a working partner of the firm and served a three-months notice to the managing partner of the firm in a letter dated 5 February 2007. The relevant part thereof reads as follows:

> Dear Sirs,
>
> **Re: Resigning as working partner**
>
> I would like to inform that I am resigning as a working partner of Millennium Medicare Services effective 5th May 2007.
>
> Thank you for the opportunity provided during my employment here.

[5] However, before the expiry of the three months, the appellant left the respondent and practiced as a medical practitioner at Klinik Medic Care which was situated within the fifteen-kilometers radius from one of the respondent's clinic. In August 2007, the respondent commenced the present action to enforce the said restrictive covenant. On 2 October 2007 the respondent obtained an interlocutory injunction restraining the appellant from practicing within the said fifteen-kilometers radius. Subsequently on 21 November 2007 the appellant applied to strike out the present writ and statement of claim. The decision of the SAR in dismissing the application was affirmed by the judge in chambers on appeal, and hence the present appeal.

[6] Mr. Mohd Faizal, for the appellant, contended that cl. 11(iii) of the agreement was a restraint covenant, and therefore void and unenforceable against the appellant under s. 28 of the Contracts Act 1950 ("the Act"). In support, learned counsel referred to *Wrigglesworth v. Wilson Anthony* [1964] 1 LNS 222 where it was held that except in respect of the three exceptions as provided in s. 28 of the Act, every agreement by which anyone is restrained from exercising a lawful profession is to that extent void. We were also referred to the case of *Polygram Records Sdn Bhd v. The Search & 5 Ors* [1994] 3 AMR 40 where it was also held that "any clause which seeks to prohibits the defendants from making any recordings after the expiry of the contract becomes an unlawful restraint of trade and is void under s. 28". In conclusion, learned counsel submitted that as the covenant to be enforced in the present suit was void, the respondent's claim herein was obviously unsustainable and ought to be struck out under any limb of O. 18 r. 19 of the RHC.

[7] Mr . K.S. Pang, for the respondent, argued that even if the said clause was a covenant in restraint of trade exception 2 to s. 28 of the Act is applicable as the parties have agreed to the restraint in anticipation of the dissolution of the partnership. He further submitted that the issue as to whether such a covenant was made in anticipation of such a dissolution was a matter for decision at a trial upon the examination of witnesses. According to learned counsel the decision in *Wrigglesworth*'s is clearly distinguishable as it concerned a covenant between an employer and employee and not a covenant between partners as in the present appeal.

[8] The question is whether, based on the pleadings and the affidavits of the parties, the learned judge had erred in law and in fact in affirming the decision of the SAR dismissing the appellant's striking out application. The principles applicable to such an application have been stated in numerous cases which adhered to the basic rule that it is only in plain and obvious cases that recourse should be had to the summary process. To justify the striking out a statement of claim, the defendant must satisfy the court that the plaintiff has no reasonable cause of action, or that the claim is on the face of it "obviously unsustainable". (see

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7). In an Australian case of *General Steel Industries Inc v. Commissioner of Railways (NSW)* [1964] 112 CLR, Barwick CJ applied the test as to "whether the plaintiff's case is so clearly untenable that it cannot possibly succeed". On the part of the plaintiff he only need to show that his claims raise a real question to be determined whether of fact or of law which can only be explored in a proper trial (see *United Manufacturers Sdn Bhd v. Pogon Tokou Sdn Bhd & Anor* [1985] 1 LNS 163.

[9] In our view this appeal can be decided by determining the following two issues, namely: (a) whether the said cl. 11(iii) is a covenant in restraint of trade under s. 28 of the Act; and (ii) if so, whether it falls within the ambit of exception 2 to that section.

[10] The law relating to 'an agreement in restraint of trade' is provided in s. 28 of the Act which reads as follows:

> **Agreement in restraint of trade void**
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> 28. Every agreement by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void.
>
> **Saving of agreement not to carry on business of which goodwill is sold**
>
> *Exception 1* – (not relevant).
>
> **of agreement between partners prior to dissolution**
>
> *Exception 2* – Partners may, upon or in anticipation of a dissolution of the partnership, agree that some or all of them will not carry on business similar to that partnership, within such local limits as are referred to in exception 1.
>
> **or during continuance of partnership**
>
> *Exception 3* – (not relevant).

[11] The said s. 28 clearly provides that a contract in restraint of trade is void unless it falls under any of the exceptions thereto. It is apparent to us that the said provision is a statutory codification of the common law principle on this subject. However, we shared the view expressed by Visu Sinnadurai J in *Polygram Records Sdn Bhd, supra*, that the validity of such covenant is not subject to the

"reasonableness test" under the common law. On this issue we also find support in the opinion expressed by Hashim J in *Wriggleworth*'s case, to the effect that the English cases were not applicable in the interpretation of the said section. Further, in our view, the inclusion of the three common law exceptions to the general rule on the covenant in restraint of trade as provided in that section is a clear manifestation of the intention of the legislature to make the said provisions exhaustive.

[12] We will proceed with the first issue. In *Petrofina (Gt. Britain) Ltd v. Martin And Another* [1966] 1 All ER 126, Lord Diplock said, at p 138: "A contract in restraint of trade is one which a party (the covenantor) agrees with any other party (the covenantee) to restrict the liberty in the future to carry on trade with other persons not parties to the contract in such manner as he chooses …". In the instant case it is apparent to us that the covenant in said cl. 11(iii) has the effect of restricting the liberty of the appellant to carry on the practice of medical practitioner in future either by himself or with other persons for such period and within such limit as specified therein. We therefore conclude that it is an agreement in restraint of trade within the meaning of s. 28 of the Act.

[13] There remains the question as to whether such an agreement was made in anticipation of the dissolution of the partnership so as to fall within the ambit of the said exception 2. In our view it was not so made. It is apparent from the wordings thereof that the said exception only apply to an agreement made between partners, and that the same was made upon or in anticipation of the dissolution of the partnership. In the present case it is without doubt that the appellant was not even a partner of the firm at the time of the execution of the agreement. It is evident from cl. 1 thereof, that he was only admitted as a partner of the firm pursuant to the agreement. Since the appellant was not even a partner of the firm then, it cannot be said that the said agreement was made in anticipation of the dissolution thereof. Further, it was not even pleaded in the statement of claim that the restrictive covenant sought to be enforced herein was made with such an objective.

A **[14]** For the reasons aforesaid, we hold that the clause sought to be enforced herein was a covenant in restraint of trade, and therefore void under s. 28 of the Act. We are satisfied that the respondent's case (to borrow the words of Barwick CJ above) is so clearly untenable that it cannot possibly succeed. Accordingly,
B we allowed the appeal with costs of RM10,000, being the costs of this appeal and that of the court below. We also ordered the deposit for this appeal to be refunded to the appellant.

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